

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF OHIO  
3 WESTERN DIVISION

4 - - -  
5 THE KROGER CO., :

6 PLAINTIFF, :

7 -VS- : CASE NO.: C-1-02-439

8 MALEASE FOODS CORP., :

9 DEFENDANT. :  
10 - - -

11 Deposition of JAMES E. HODGE, a witness  
12 herein, taken by the defendant as upon  
13 cross-examination pursuant to the Federal Rules of  
14 Civil Procedure, and pursuant to agreement and  
15 stipulations hereinafter set forth at the offices  
16 of Frost, Brown & Todd, LLC, 2200 PNC Center, 201  
17 East Fifth Street, Cincinnati, Ohio at 11:36 a.m.  
18 on Wednesday, March 3, 2004, before Britney L.  
19 Fisher, a notary public within and for the State of  
20 Kentucky.

21 - - -  
22  
23  
24

1 A. Oh, sure. Prior to August 27th?  
 2 Q. Right.  
 3 A. Absolutely.  
 4 Q. Okay. You had many discussions?  
 5 A. Several, I'm sure.  
 6 Q. Okay. Do you remember any  
 7 specifically during the month of August, between  
 8 July 24th the date of the closing and Ed's letter  
 9 of August 27th?  
 10 A. Well, it's obvious from my e-mail  
 11 that a decision was made to pay the \$100,000 the  
 12 very next day after closing, and I know that Ed and  
 13 I had a conversation about making that payment.  
 14 Q. I'm sorry, maybe we're confused. I'm  
 15 talking about now approaching Kadish.  
 16 A. Say it again then.  
 17 Q. Okay. What I'm trying to find out is  
 18 between July, the closing in July.  
 19 A. Correct.  
 20 Q. And August 27th when Ed sent the  
 21 letter, do you remember a discussion about the  
 22 strategy, if you will, of dealing with Malease and  
 23 Kadish?  
 24 A. No.

1 Q. Now, this letter of August 27th, did  
 2 Jim Price ever suggest to you that Ed sent him a  
 3 letter like this?  
 4 A. Not to my knowledge.  
 5 Q. Did Jim Price participate in any way  
 6 in drafting this letter?  
 7 A. Don't know.  
 8 Q. At the time you asked Jim to assist  
 9 you with your September 17th letter -- I'm sorry,  
 10 September 13th, I'll give it to you in just a  
 11 second. This goes with it. I don't have these  
 12 things on, okay, we'll get it together.  
 13 A. Okay.  
 14 Q. Now, Exhibit P is your --  
 15 A. My letter.  
 16 Q. The attachment to Exhibit P is a  
 17 2-page document, the first of which is a Price  
 18 letter to Kadish, September 17th, 2001, where he  
 19 says I received the attached letter this morning  
 20 from my friend, Jim Hodge, at Kroger. Please read  
 21 it and advise. Then attached to that is your  
 22 September 13th, 2001 letter.  
 23 Okay. Now, do you know whether --  
 24 Withdrawn.

1 At the time -- Withdrawn.  
 2 You tell me, your September 13th  
 3 letter, how did that come to be prepared?  
 4 A. Well, my recollection is we had  
 5 recently closed on the Merrill Lynch transaction,  
 6 and we wanted to effect the purchase of the Malease  
 7 position. We thought it best at the time that Jim  
 8 Price would continue to act as our representative  
 9 now between Kroger and Kadish. This letter I  
 10 believe I solicited his thoughts on a letter that  
 11 we then would send to Mr. Kadish that would start  
 12 the process of purchasing the Malease interest.  
 13 Q. And when you say "solicited his  
 14 thoughts," did the two of you meet together to  
 15 discuss this?  
 16 A. No.  
 17 Q. Was it was done on the phone?  
 18 A. Correct.  
 19 Q. You placed the call to Price?  
 20 A. Most likely.  
 21 Q. And in terms of timing how close in  
 22 time to September 13th; how close, your letter is  
 23 dated September 13th?  
 24 A. My guess judgement-wise some time

1 within the prior two weeks we had a phone  
 2 conversation about the next step in this  
 3 transaction. I don't remember exactly the date.  
 4 Q. What do you remember saying to him  
 5 about this?  
 6 A. I'm going to characterize the  
 7 conversation.  
 8 Q. Yes, the gist I realize.  
 9 A. We're interested in buying the  
 10 Malease position. We've got this feature in our  
 11 document that, you know, we need to send to Malease  
 12 notice by April of 2002, is there a chance that we  
 13 might accelerate the closing of the Malease  
 14 transaction. And this was to set that process in  
 15 motion.  
 16 Q. Well, did Price suggest to you that  
 17 he write a letter, which you would then sign or did  
 18 you ask him?  
 19 A. I'm sure I asked him.  
 20 Q. Why did you ask him; why didn't you  
 21 just write a letter?  
 22 A. Because I wanted to be sure we were  
 23 as technically correct as we needed to be to effect  
 24 the purchase option. Jim had knowledge of the

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1 original transaction, Jim knew Mr. Kadish we  
2 understood, and so I wanted the benefit of his  
3 thoughts so that we didn't omit something, but I  
4 know it was upon my request that he drafted it.

5 **Q. During your -- During this**  
6 **discussion, was there more than one discussion with**  
7 **Price about this request that he draft?**

8 A. I don't remember more than one, just  
9 one.

10 **Q. Did Price give you more than one**  
11 **draft of a proposed letter?**

12 A. I don't recall.

13 **Q. Did Price suggest to you that the**  
14 **letter be fashioned in such a way as to, I don't**  
15 **want to sound perjorative, to withhold certain**  
16 **information from Kadish; was that Price's idea or**  
17 **was it yours?**

18 MR. PHILLIPS: Objection.

19 A. To my knowledge, we didn't withhold  
20 anything.

21 **Q. Well, did Price say to you in words**  
22 **or substance send me a letter that will make it**  
23 **look like I just found out that Kroger had closed**  
24 **on the Bulkhouse transaction?**

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1 A. No.

2 **Q. So did that come to you as a bolt out**  
3 **of the blue when he sent you the draft?**

4 A. I'm sorry, the draft that this letter  
5 is based upon?

6 **Q. The draft of what ultimately became**  
7 **the September 13th --**

8 A. Not at all. I had asked him for it.

9 **Q. And your testimony is that you -- as**  
10 **of September you did not know the nature and scope**  
11 **and extent of the relationship of trust and**  
12 **confidence, if any, that might have existed between**  
13 **Kadish and Price?**

14 MR. PHILLIPS: Objection. Asked and  
15 answered numerous times. You can answer it yet  
16 again.

17 A. You're correct, I did not.

18 **Q. Now, as of September 2001, did you**  
19 **and Price ever have any discussion where in words**  
20 **or substance you were troubled that, by purchasing**  
21 **the Bulkhouse position prior to the expiration of**  
22 **the term of the lease, you might have some legal**  
23 **difficulty buying Malease's interest?**

24 A. No.

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1 **Q. That never was a topic in your**  
2 **consideration; is that correct?**

3 A. Correct.

4 **Q. And you certainly didn't ask Price to**  
5 **use his influence with Kadish, because you or**  
6 **Kroger were in any way concerned that you might**  
7 **have, to use a vernacular, blown the option to**  
8 **purchase the Malease piece, correct?**

9 A. That is correct. I might add that we  
10 did Mr. Kadish a huge favor earlier on. At the  
11 time we were making the sublease with H.E. Butt,  
12 Mr. Kadish needed a copy of many documents that  
13 only we had in our file, and we allowed him to copy  
14 the entire set of documentation supporting this  
15 transaction. For some reason he and Merrill Lynch  
16 had gotten crosswise over the years, and there was  
17 not a flow of information between Merrill Lynch and  
18 Kadish.

19 **Q. So what I take away from what you**  
20 **just said is that you felt that Kroger had behaved**  
21 **honorably and nicely toward Kadish up until**  
22 **September of 2001, right?**

23 A. We believe we lived up to the  
24 strictest interpretation of the contracts.

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1 **Q. And you'd even gone overboard, you**  
2 **did things for Kadish I think you just said that**  
3 **you didn't have any legal duty to do?**

4 A. Absolutely.

5 **Q. You were accommodating him?**

6 A. That's correct.

7 **Q. If that's the case, why didn't you**  
8 **just write him the letter yourself; why did you**  
9 **have to go through this thing with Price?**

10 MR. PHILLIPS: Objection. He just  
11 testified to that, but do you have anything else to  
12 add?

13 A. No. Price knew the structure of this  
14 transaction because of his early involvement. He  
15 had been involved and assisted us with the Merrill  
16 Lynch transaction. Just with everything that we  
17 deal with in our corporate office, it's something  
18 that you use an agent to help you with or  
19 representative to help you with, so we took  
20 advantage of his knowledge of the transaction, the  
21 history of the transaction to take it to the final  
22 step.

23 **Q. Well, when you say "you use an**  
24 **agent," do you typically instruct agents to provide**

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1 misinformation?

2 A. No.

3 MR. PHILLIPS: Objection.

4 Q. As far as --

5 A. That's a lead question.

6 Q. As far as you were concerned was this  
7 letter of September 13th, 2001 written so as to  
8 pull the wool over Kadish's eyes?

9 A. No.

10 Q. As of September 13th, 2001 Price  
11 certainly knew that the closing had occurred back  
12 in July, right?

13 MR. PHILLIPS: Objection,  
14 argumentative. You can answer.

15 A. Yes.

16 Q. Right. He's been paid weeks before.

17 Now, we saw Ed Waldvogel's letter of  
18 August 27th, as I said, that's two weeks before  
19 your September 13th letter. I believe you told me  
20 you didn't see it at the time it was sent, correct?

21 A. Correct.

22 Q. Prior to September 13th, did you see  
23 Ed's letter?

24 A. Not to my knowledge.

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1 Q. Did he tell you about it?

2 A. Not to my knowledge. I don't recall.

3 Q. Then how do you come to make the  
4 statement in your September 13th letter at the  
5 bottom I was visiting with my associate, Ed  
6 Waldvogel, et cetera, et cetera, and it would make  
7 it simpler accounting-wise?

8 A. Okay. What's your point?

9 Q. My point is you just told me that  
10 you'd never seen the August 27th Waldvogel letter?

11 A. What's it have to do with what you  
12 asked me?

13 Q. I'll tell you in a second.

14 Were you visiting with your  
15 associate, Waldvogel, some time prior to September  
16 13th and having discussions with him?

17 A. I'm sure I was.

18 Q. But you want us to believe that even  
19 though you're talking to Waldvogel about this he  
20 doesn't say to you, oh, by the way, Jim, I've  
21 already sent a letter to Jim Price asking for  
22 Malease's help?

23 MR. PHILLIPS: Objection.

24 Q. Right?

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1 MR. PHILLIPS: Objection.

2 A. That's a transmittal letter. I had  
3 no need to see that letter. Ed handled the  
4 payment, he used his own verbiage to transmit the  
5 check.

6 Q. So when he says but Malease is still  
7 out there, I hope you are still planning to finish  
8 this piece of the transaction by negotiating a  
9 price to buy him out early, we can then buy from  
10 you or by direct, whatever works best, in your  
11 contemplation that's language of transmittal?

12 A. You're asking the wrong person.

13 Q. I don't know.

14 A. I've not seen that letter.

15 Q. Who should I ask?

16 A. I have no knowledge of that letter.

17 I'm sure that the check that you showed me earlier  
18 got processed. I assume it came to my secretary's  
19 attention. I assume she took it up to Ed's office  
20 and he wrote that letter and enclosed the check.  
21 After that or some time between then and this  
22 letter we wanted to formalize the process of  
23 purchasing the Malease piece, which precipitated  
24 this letter.

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1 Q. So you're telling me about the check  
2 and the transmission of the check. I would like to  
3 focus you on the sentence that states, this is Ed's  
4 letter of August 27, all right, but Malease is  
5 still out there, I hope you are still planning to  
6 finish this piece of the transaction by negotiating  
7 a price to buy him out early, we can then buy from  
8 you or buy direct, whatever works best.

9 I want to focus on that language.

10 And I know that you wrote your September 13th  
11 letter or Price wrote it for you, but you signed  
12 it, right?

13 A. I signed it. I need to read it one  
14 more time here.

15 Q. Read the part that says I was  
16 visiting with my associate?

17 A. I'm sure I wrote that without any  
18 help. That's my style.

19 Q. Was it a true statement?

20 A. I'm sure Ed and I had a meeting and  
21 discussed it, what -- where we go next.

22 Q. And it would be sent, and you say  
23 here it would make it simpler accounting-wise for  
24 us if we purchase Malease Foods Corp. now, right?

18 (Pages 66 to 69)

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1 A. Correct.  
 2 Q. Did you instruct Jennifer Jones to  
 3 send that to Price on September 14th?  
 4 A. By fax?  
 5 Q. By fax or mail.  
 6 A. Yes, most likely. And probably a  
 7 hard copy in the mail.  
 8 Q. Okay. Now, you see in the upper  
 9 right-hand corner Jennifer had printed 9/13, that  
 10 is Jennifer's printing?  
 11 A. It is.  
 12 Q. 9/13/01, that's September 13th?  
 13 A. Correct.  
 14 Q. BCC, blind carbon copy?  
 15 A. Exactly.  
 16 Q. E Waldvogel, right?  
 17 A. Correct.  
 18 Q. That's the gentleman seated down at  
 19 the end of the table, correct?  
 20 THE WITNESS: Is that your name?  
 21 MR. WALDVOGEL: (Nodding head.)  
 22 MR. CINQUE: Unless there's more  
 23 than one.  
 24 BY MR. CINQUE:

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1 Q. So now we know on September 13th,  
 2 whether you can remember or not remember the August  
 3 27th Waldvogel letter, we know that on September  
 4 13th you let Waldvogel know or through your  
 5 secretary let him know that you were sending this  
 6 September 14th letter?  
 7 A. September 13th.  
 8 Q. September 13th, right?  
 9 A. Correct.  
 10 Q. Now, did Waldvogel come to you on or  
 11 about September 13th or right after that and  
 12 discuss this with you?  
 13 A. I'm sure we discussed it prior to it  
 14 going out, but I don't have any recollection of it  
 15 happening after it went out.  
 16 Q. So now you're saying Waldvogel knew  
 17 that this September 13th letter was going out,  
 18 right?  
 19 A. I can't be absolutely sure, but I  
 20 would -- Ed and I confer on all of these matters  
 21 pretty closely.  
 22 Q. But your testimony, and correct me if  
 23 I'm wrong, is you had no recollection of discussing  
 24 Ed's letter with him before you sent your September

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1 13th letter, right?  
 2 A. Correct.  
 3 MR. PHILLIPS: Bob, that's got to be  
 4 at least 15 times you asked that question. How  
 5 many more times are you going to ask it, I'm  
 6 curious?  
 7 MR. CINQUE: I apologize.  
 8 BY MR. CINQUE:  
 9 Q. Okay. And, of course, the facsimile  
 10 cover sheet, the third page, KSUPP 00180, that's  
 11 the facsimile cover sheet from Jim Price to Jim  
 12 Hodge, yourself, right, that's dated September  
 13 13th, and I represent to you that the second  
 14 page --  
 15 A. The third page?  
 16 Q. The second page, the one that should  
 17 have followed 180, right, because it says pages  
 18 including this cover page. And then he says in the  
 19 memo to you per our conversation attached is a  
 20 suggested letter that you and Ed can edit that I  
 21 propose you write to me concerning the purchase of  
 22 Malease.  
 23 I represent to you that the  
 24 attachment has never been produced to me, that this

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1 is all I have, all right. We'll get to the bottom  
 2 of that at some point. And the reason I'm making  
 3 that representation is to give the Kroger attorneys  
 4 every opportunity to show that I'm wrong and that I  
 5 got it.  
 6 Now, so here we have Price, do you  
 7 know when this document, this KSUPP 180, first  
 8 surfaced as part of the document production in this  
 9 lawsuit?  
 10 A. I don't.  
 11 Q. Okay. So here's Jim Price telling  
 12 you per our conversation attached is a suggested  
 13 letter that you and Ed can edit, right?  
 14 MR. PHILLIPS: Second time you've  
 15 read that.  
 16 Q. Right. Did you -- Forgive me, I want  
 17 to get the question clear so when the witness  
 18 answers it, we can see. It states per our  
 19 conversation attached is a suggested letter that  
 20 you and Ed can edit. During your conversation with  
 21 Jim Price, did you talk to him about collaborating  
 22 with Ed in the editing of a letter that you would  
 23 now send to Jim Price who in turn would send to  
 24 Kadish?

20 (Pages 74 to 77)



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1 representing Kroger in this case?

2 A. I didn't know that.

3 Q. Okay. Did you instruct the lawyers  
4 to withhold any of the Price & Marshall documents?

5 A. Absolutely not.

6 Q. Did you authorize these lawyers to  
7 actually physically stamp and produce the Price &  
8 Marshall documents?

9 A. Did not.

10 Q. Do you know that I served a subpoena  
11 on Price & Marshall?

12 A. Did not.

13 Q. Now, subsequent to September 13th,  
14 did you ever again participate in the drafting of  
15 any letter concerning purchase of the Malease  
16 interest, which contained any false or misleading  
17 information in it?

18 A. No.

19 Q. You're sure?

20 A. Yes.

21 Q. Sir, isn't it a fact that on February  
22 18th, 2002 you wrote another misleading letter to  
23 Price?

24 MR. PHILLIPS: Objection,

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1 agree with me in February of 2002, April of 2003  
2 wouldn't be only 18 months away, right?

3 A. That is correct.

4 Q. Are you aware that Price & Marshall  
5 and not Kroger and your lawyers produced a letter  
6 dated February 18th, 2002 on Kroger letterhead?

7 A. I am not.

8 (Deposition Exhibit W was marked for  
9 identification.)

10 BY MR. CINQUE:

11 Q. Let me show you this. We've marked  
12 that as W. Please explain, if you can, the genesis  
13 of Exhibit W.

14 A. It's a repeat of the September 13th  
15 letter.

16 Q. What's the date of Exhibit W?

17 A. February 18th, '02.

18 Q. Did you cause that to be prepared on  
19 February 18th, 2002?

20 A. Don't recall.

21 Q. Look at the fax heading up at the  
22 top?

23 A. Doesn't show on this one.

24 Q. Sorry. I apologize, it's cut off.

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1 argumentative.

2 A. I don't write misleading letters.

3 Q. You know the thing about I wanted to  
4 advise you that on July 24, 2001 Kroger Co.  
5 purchased, you know that's in your September 13th  
6 letter; do you see that?

7 A. I do.

8 Q. You've repeated it in the later  
9 letter, didn't you?

10 A. I don't remember.

11 Q. Why did you write it again?

12 MR. PHILLIPS: Objection. He just  
13 testified he doesn't remember. You have the  
14 letter, why don't you show it to him.

15 MR. CINQUE: I sure do.

16 MR. PHILLIPS: Great. Let's see  
17 it.

18 BY MR. CINQUE:

19 Q. You see at the bottom of that one it  
20 says --

21 MR. PHILLIPS: Which one?

22 Q. I'm talking now about the September  
23 13th letter. It says that April 2003 is only 18  
24 months away. That seems about right, so you would

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1 Take a look at my copy I'll give you. I think the  
2 Xerox cut it off. I'll tell you what it says for  
3 the record. The fax header, which my photocopy is  
4 cut off somewhat, is March 20th, 2002, 10:52 a.m.  
5 FR Kroger to (919) 788-7093, and this shows that  
6 it's page 4 in the right-hand corner.

7 And it bears PM, which is Price &  
8 Marshall bates stamp number 01538. And the way I  
9 obtained this is it was produced to me by the  
10 Frost, Brown firm, even though I subpoenaed it from  
11 Price & Marshall. Do you recognize the fax header?

12 A. It looks like it came from Kroger on  
13 March the 20th of '02.

14 Q. Can you enlighten me in any way as to  
15 where the remaining pages of this fax transmission  
16 might be?

17 A. I cannot.

18 Q. Did you authorize anyone to send this  
19 to Price on March 20th, 2002?

20 MR. PHILLIPS: Objection.

21 A. I don't remember.

22 Q. Can you tell me anything more about  
23 this letter, sir, than you already have?

24 A. Only speculate.

22 (Pages 82 to 85)

1 **Q. Please speculate?**  
 2 **MR. PHILLIPS:** I'll object.  
 3 **MR. CINQUE:** Your objection is  
 4 noted.  
 5 **BY MR. CINQUE:**  
 6 **A.** Someone asked us for another copy of  
 7 the letter.  
 8 **Q. So you went and changed the date?**  
 9 **A.** No. The system automatically updates  
 10 the date. Have you ever used software where you  
 11 plug in a date and it automatically puts the  
 12 current date on when you make another copy?  
 13 **Q. Great. Then it should have been**  
 14 **March 20th, should it, the date that you sent it?**  
 15 **February 18th, does that date stick out in your**  
 16 **mind at all?**  
 17 **A.** Four days after Valentine's Day.  
 18 **Q. Isn't it also the date that Kroger**  
 19 **sent a certified letter to Malease Bulkhouse ML**  
 20 **Properties? Let's look at it.**  
 21 **(Deposition Exhibit X was marked for**  
 22 **identification.)**  
 23 **BY MR. CINQUE:**  
 24 **Q. You recognize the February 18th, 2002**

1 **MR. PHILLIPS:** Thank you. Off the  
 2 record.  
 3 (Brief recess.)  
 4 **MR. CINQUE:** I'm genuinely finished  
 5 with Mr. Hodge.  
 6 **THE WITNESS:** Very good.  
 7 **MR. PHILLIPS:** I want to give you  
 8 another opportunity to ask questions to Ed about  
 9 document production. I think in the midst of all  
 10 that --  
 11 **MR. CINQUE:** After you woodshedded  
 12 him, as we say.  
 13 **MR. PHILLIPS:** No. Have we  
 14 discussed anything about this?  
 15 **MR. WALDVOGEL:** (Nodding head.)  
 16 **MR. CINQUE:** He doesn't look like  
 17 it. You want to have him say something?  
 18 **MR. PHILLIPS:** You can ask him  
 19 anything you want to.  
 20 **MR. CINQUE:** I don't really have any  
 21 questions.  
 22 **MR. PHILLIPS:** Okay, good. We'll  
 23 reserve on him, too.  
 24

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1 letter, Exhibit X, correct?  
 2 **A.** Yes.  
 3 **Q. That's the old letter where you're**  
 4 **notifying Malease and others with the reference to**  
 5 **Article 35, right?**  
 6 **A.** Yes.  
 7 **Q. This is where Kroger is saying in**  
 8 **substance pursuant to Article 35 of each of the**  
 9 **occupancy leases dated April 1st, 1983 and certain**  
 10 **provisions of the two-party agreements, right,**  
 11 **Kroger exercises its purchase option, right?**  
 12 **A.** Correct.  
 13 **Q. Is there any relationship of any kind**  
 14 **that you wish to share with us about Exhibit W, the**  
 15 **February 18th, 2002 letter to Jim Price and Exhibit**  
 16 **X, the February 18th, 2002 option exercise?**  
 17 **A.** No.  
 18 **Q. No connection whatsoever?**  
 19 **A.** I cannot recall any connection.  
 20 **MR. PHILLIPS:** Bob, do you mind if I  
 21 see the fax?  
 22 **MR. CINQUE:** You can take it and  
 23 copy it. You'll see it cut off. I'll give you  
 24 that. My machine does that from time to time.

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1  
 2  
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 4  
 5 **JAMES E. HODGE**  
 6 - - -  
 7 **DEPOSITION CONCLUDED AT 1:25 P.M.**  
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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF OHIO  
3 WESTERN DIVISION  
4 - - -

5 THE KROGER CO., :

6 PLAINTIFF, :

7 -VS-

: CASE NO.: C-1-02-439

8 MALEASE FOODS CORP., :

9 DEFENDANT. :  
10 - - -

11 Deposition of JAMES E. HODGE, a witness  
12 herein, taken by the defendant as upon  
13 cross-examination pursuant to the Federal Rules of  
14 Civil Procedure, and pursuant to agreement and  
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16 of Frost, Brown & Todd, LLC, 2200 PNC Center, 201  
17 East Fifth Street, Cincinnati, Ohio at 11:36 a.m.  
18 on Wednesday, March 3, 2004, before Britney L.  
19 Fisher, a notary public within and for the State of  
20 Kentucky.  
21 - - -  
22  
23  
24



1 A. Oh, sure. Prior to August 27th?

2 Q. Right.

3 A. Absolutely.

4 Q. Okay. You had many discussions?

5 A. Several, I'm sure.

6 Q. Okay. Do you remember any  
7 specifically during the month of August, between  
8 July 24th the date of the closing and Ed's letter  
9 of August 27th?

10 A. Well, it's obvious from my e-mail  
11 that a decision was made to pay the \$100,000 the  
12 very next day after closing, and I know that Ed and  
13 I had a conversation about making that payment.

14 Q. I'm sorry, maybe we're confused. I'm  
15 talking about now approaching Kadish.

16 A. Say it again then.

17 Q. Okay. What I'm trying to find out is  
18 between July, the closing in July.

19 A. Correct.

20 Q. And August 27th when Ed sent the  
21 letter, do you remember a discussion about the  
22 strategy, if you will, of dealing with Malease and  
23 Kadish?

24 A. No.

1 Q. Now, this letter of August 27th, did  
2 Jim Price ever suggest to you that Ed sent him a  
3 letter like this?

4 A. Not to my knowledge.

5 Q. Did Jim Price participate in any way  
6 in drafting this letter?

7 A. Don't know.

8 Q. At the time you asked Jim to assist  
9 you with your September 17th letter -- I'm sorry,  
10 September 13th, I'll give it to you in just a  
11 second. This goes with it. I don't have these  
12 things on, okay, we'll get it together.

13 A. Okay.

14 Q. Now, Exhibit P is your --

15 A. My letter.

16 Q. The attachment to Exhibit P is a  
17 2-page document, the first of which is a Price  
18 letter to Kadish, September 17th, 2001, where he  
19 says I received the attached letter this morning  
20 from my friend, Jim Hodge, at Kroger. Please read  
21 it and advise. Then attached to that is your  
22 September 13th, 2001 letter.

23 Okay. Now, do you know whether --  
24 Withdrawn.

1 At the time -- Withdrawn.

2 You tell me, your September 13th  
3 letter, how did that come to be prepared?

4 A. Well, my recollection is we had  
5 recently closed on the Merrill Lynch transaction,  
6 and we wanted to effect the purchase of the Malease  
7 position. We thought it best at the time that Jim  
8 Price would continue to act as our representative  
9 now between Kroger and Kadish. This letter I  
10 believe I solicited his thoughts on a letter that  
11 we then would send to Mr. Kadish that would start  
12 the process of purchasing the Malease interest.

13 Q. And when you say "solicited his  
14 thoughts," did the two of you meet together to  
15 discuss this?

16 A. No.

17 Q. Was it was done on the phone?

18 A. Correct.

19 Q. You placed the call to Price?

20 A. Most likely.

21 Q. And in terms of timing how close in  
22 time to September 13th; how close, your letter is  
23 dated September 13th?

24 A. My guess judgement-wise some time

1 within the prior two weeks we had a phone  
2 conversation about the next step in this  
3 transaction. I don't remember exactly the date.

4 Q. What do you remember saying to him  
5 about this?

6 A. I'm going to characterize the  
7 conversation.

8 Q. Yes, the gist I realize.

9 A. We're interested in buying the  
10 Malease position. We've got this feature in our  
11 document that, you know, we need to send to Malease  
12 notice by April of 2002, is there a chance that we  
13 might accelerate the closing of the Malease  
14 transaction. And this was to set that process in  
15 motion.

16 Q. Well, did Price suggest to you that  
17 he write a letter, which you would then sign or did  
18 you ask him?

19 A. I'm sure I asked him.

20 Q. Why did you ask him; why didn't you  
21 just write a letter?

22 A. Because I wanted to be sure we were  
23 as technically correct as we needed to be to effect  
24 the purchase option. Jim had knowledge of the

1 original transaction, Jim knew Mr. Kadish we  
2 understood, and so I wanted the benefit of his  
3 thoughts so that we didn't omit something, but I  
4 know it was upon my request that he drafted it.

5 **Q. During your -- During this**  
6 **discussion, was there more than one discussion with**  
7 **Price about this request that he draft?**

8 **A. I don't remember more than one, just**  
9 **one.**

10 **Q. Did Price give you more than one**  
11 **draft of a proposed letter?**

12 **A. I don't recall.**

13 **Q. Did Price suggest to you that the**  
14 **letter be fashioned in such a way as to, I don't**  
15 **want to sound perjorative, to withhold certain**  
16 **information from Kadish; was that Price's idea or**  
17 **was it yours?**

18 **MR. PHILLIPS: Objection.**

19 **A. To my knowledge, we didn't withhold**  
20 **anything.**

21 **Q. Well, did Price say to you in words**  
22 **or substance send me a letter that will make it**  
23 **look like I just found out that Kroger had closed**  
24 **on the Bulkhouse transaction?**

1 **A. No.**

2 **Q. So did that come to you as a bolt out**  
3 **of the blue when he sent you the draft?**

4 **A. I'm sorry, the draft that this letter**  
5 **is based upon?**

6 **Q. The draft of what ultimately became**  
7 **the September 13th --**

8 **A. Not at all. I had asked him for it.**

9 **Q. And your testimony is that you -- as**  
10 **of September you did not know the nature and scope**  
11 **and extent of the relationship of trust and**  
12 **confidence, if any, that might have existed between**  
13 **Kadish and Price?**

14 **MR. PHILLIPS: Objection. Asked and**  
15 **answered numerous times. You can answer it yet**  
16 **again.**

17 **A. You're correct, I did not.**

18 **Q. Now, as of September 2001, did you**  
19 **and Price ever have any discussion where in words**  
20 **or substance you were troubled that, by purchasing**  
21 **the Bulkhouse position prior to the expiration of**  
22 **the term of the lease, you might have some legal**  
23 **difficulty buying Malease's interest?**

24 **A. No.**

1 **Q. That never was a topic in your**  
2 **consideration; is that correct?**

3 **A. Correct.**

4 **Q. And you certainly didn't ask Price to**  
5 **use his influence with Kadish, because you or**  
6 **Kroger were in any way concerned that you might**  
7 **have, to use a vernacular, blown the option to**  
8 **purchase the Malease piece, correct?**

9 **A. That is correct. I might add that we**  
10 **did Mr. Kadish a huge favor earlier on. At the**  
11 **time we were making the sublease with H.E. Butt,**  
12 **Mr. Kadish needed a copy of many documents that**  
13 **only we had in our file, and we allowed him to copy**  
14 **the entire set of documentation supporting this**  
15 **transaction. For some reason he and Merrill Lynch**  
16 **had gotten crosswise over the years, and there was**  
17 **not a flow of information between Merrill Lynch and**  
18 **Kadish.**

19 **Q. So what I take away from what you**  
20 **just said is that you felt that Kroger had behaved**  
21 **honorably and nicely toward Kadish up until**  
22 **September of 2001, right?**

23 **A. We believe we lived up to the**  
24 **strictest interpretation of the contracts.**

1 **Q. And you'd even gone overboard, you**  
2 **did things for Kadish I think you just said that**  
3 **you didn't have any legal duty to do?**

4 **A. Absolutely.**

5 **Q. You were accommodating him?**

6 **A. That's correct.**

7 **Q. If that's the case, why didn't you**  
8 **just write him the letter yourself; why did you**  
9 **have to go through this thing with Price?**

10 **MR. PHILLIPS: Objection. He just**  
11 **testified to that, but do you have anything else to**  
12 **add?**

13 **A. No. Price knew the structure of this**  
14 **transaction because of his early involvement. He**  
15 **had been involved and assisted us with the Merrill**  
16 **Lynch transaction. Just with everything that we**  
17 **deal with in our corporate office, it's something**  
18 **that you use an agent to help you with or**  
19 **representative to help you with, so we took**  
20 **advantage of his knowledge of the transaction, the**  
21 **history of the transaction to take it to the final**  
22 **step.**

23 **Q. Well, when you say "you use an**  
24 **agent," do you typically instruct agents to provide**

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1 misinformation?

2 A. No.

3 MR. PHILLIPS: Objection.

4 Q. As far as --

5 A. That's a lead question.

6 Q. As far as you were concerned was this

7 letter of September 13th, 2001 written so as to

8 pull the wool over Kadish's eyes?

9 A. No.

10 Q. As of September 13th, 2001 Price  
11 certainly knew that the closing had occurred back  
12 in July, right?

13 MR. PHILLIPS: Objection,  
14 argumentative. You can answer.

15 A. Yes. .

16 Q. Right. He's been paid weeks before.

17 Now, we saw Ed Waldvogel's letter of  
18 August 27th, as I said, that's two weeks before  
19 your September 13th letter. I believe you told me  
20 you didn't see it at the time it was sent, correct?

21 A. Correct.

22 Q. Prior to September 13th, did you see  
23 Ed's letter?

24 A. Not to my knowledge.

1 MR. PHILLIPS: Objection.

2 A. That's a transmittal letter. I had  
3 no need to see that letter. Ed handled the  
4 payment, he used his own verbiage to transmit the  
5 check.

6 Q. So when he says but Malease is still  
7 out there, I hope you are still planning to finish  
8 this piece of the transaction by negotiating a  
9 price to buy him out early, we can then buy from  
10 you or by direct, whatever works best, in your  
11 contemplation that's language of transmittal?

12 A. You're asking the wrong person.

13 Q. I don't know.

14 A. I've not seen that letter.

15 Q. Who should I ask?

16 A. I have no knowledge of that letter.

17 I'm sure that the check that you showed me earlier  
18 got processed. I assume it came to my secretary's  
19 attention. I assume she took it up to Ed's office  
20 and he wrote that letter and enclosed the check.

21 After that or some time between then and this  
22 letter we wanted to formalize the process of  
23 purchasing the Malease piece, which precipitated  
24 this letter.

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1 Q. Did he tell you about it?

2 A. Not to my knowledge. I don't recall.

3 Q. Then how do you come to make the  
4 statement in your September 13th letter at the  
5 bottom I was visiting with my associate, Ed  
6 Waldvogel, et cetera, et cetera, and it would make  
7 it simpler accounting-wise?

8 A. Okay. What's your point?

9 Q. My point is you just told me that  
10 you'd never seen the August 27th Waldvogel letter?

11 A. What's it have to do with what you  
12 asked me?

13 Q. I'll tell you in a second.

14 Were you visiting with your  
15 associate, Waldvogel, some time prior to September  
16 13th and having discussions with him?

17 A. I'm sure I was.

18 Q. But you want us to believe that even  
19 though you're talking to Waldvogel about this he  
20 doesn't say to you, oh, by the way, Jim, I've  
21 already sent a letter to Jim Price asking for  
22 Malease's help?

23 MR. PHILLIPS: Objection.

24 Q. Right?

1 Q. So you're telling me about the check  
2 and the transmission of the check. I would like to  
3 focus you on the sentence that states, this is Ed's  
4 letter of August 27, all right, but Malease is  
5 still out there, I hope you are still planning to  
6 finish this piece of the transaction by negotiating  
7 a price to buy him out early, we can then buy from  
8 you or buy direct, whatever works best.

9 I want to focus on that language.

10 And I know that you wrote your September 13th  
11 letter or Price wrote it for you, but you signed  
12 it, right?

13 A. I signed it. I need to read it one  
14 more time here.

15 Q. Read the part that says I was  
16 visiting with my associate?

17 A. I'm sure I wrote that without any  
18 help. That's my style.

19 Q. Was it a true statement?

20 A. I'm sure Ed and I had a meeting and  
21 discussed it, what -- where we go next.

22 Q. And it would be sent, and you say  
23 here it would make it simpler accounting-wise for  
24 us if we purchase Malease Foods Corp. now, right?

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1 A. Correct.  
 2 Q. Did you instruct Jennifer Jones to  
 3 send that to Price on September 14th?  
 4 A. By fax?  
 5 Q. By fax or mail.  
 6 A. Yes, most likely. And probably a  
 7 hard copy in the mail.  
 8 Q. Okay. Now, you see in the upper  
 9 right-hand corner Jennifer had printed 9/13, that  
 10 is Jennifer's printing?  
 11 A. It is.  
 12 Q. 9/13/01, that's September 13th?  
 13 A. Correct.  
 14 Q. BCC, blind carbon copy?  
 15 A. Exactly.  
 16 Q. E Waldvogel, right?  
 17 A. Correct.  
 18 Q. That's the gentleman seated down at  
 19 the end of the table, correct?  
 20 THE WITNESS: Is that your name?  
 21 MR. WALDVOGEL: (Nodding head.)  
 22 MR. CINQUE: Unless there's more  
 23 than one.  
 24 BY MR. CINQUE:

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1 Q. So now we know on September 13th,  
 2 whether you can remember or not remember the August  
 3 27th Waldvogel letter, we know that on September  
 4 13th you let Waldvogel know or through your  
 5 secretary let him know that you were sending this  
 6 September 14th letter?  
 7 A. September 13th.  
 8 Q. September 13th, right?  
 9 A. Correct.  
 10 Q. Now, did Waldvogel come to you on or  
 11 about September 13th or right after that and  
 12 discuss this with you?  
 13 A. I'm sure we discussed it prior to it  
 14 going out, but I don't have any recollection of it  
 15 happening after it went out.  
 16 Q. So now you're saying Waldvogel knew  
 17 that this September 13th letter was going out,  
 18 right?  
 19 A. I can't be absolutely sure, but I  
 20 would -- Ed and I confer on all of these matters  
 21 pretty closely.  
 22 Q. But your testimony, and correct me if  
 23 I'm wrong, is you had no recollection of discussing  
 24 Ed's letter with him before you sent your September

1 13th letter, right?  
 2 A. Correct.  
 3 MR. PHILLIPS: Bob, that's got to be  
 4 at least 15 times you asked that question. How  
 5 many more times are you going to ask it, I'm  
 6 curious?  
 7 MR. CINQUE: I apologize.  
 8 BY MR. CINQUE:  
 9 Q. Okay. And, of course, the facsimile  
 10 cover sheet, the third page, KSUPP 00180, that's  
 11 the facsimile cover sheet from Jim Price to Jim  
 12 Hodge, yourself, right, that's dated September  
 13 13th, and I represent to you that the second  
 14 page --  
 15 A. The third page?  
 16 Q. The second page, the one that should  
 17 have followed 180, right, because it says pages  
 18 including this cover page. And then he says in the  
 19 memo to you per our conversation attached is a  
 20 suggested letter that you and Ed can edit that I  
 21 propose you write to me concerning the purchase of  
 22 Malease.  
 23 I represent to you that the  
 24 attachment has never been produced to me, that this

1 is all I have, all right. We'll get to the bottom  
 2 of that at some point. And the reason I'm making  
 3 that representation is to give the Kroger attorneys  
 4 every opportunity to show that I'm wrong and that I  
 5 got it.  
 6 Now, so here we have Price, do you  
 7 know when this document, this KSUPP 180, first  
 8 surfaced as part of the document production in this  
 9 lawsuit?  
 10 A. I don't.  
 11 Q. Okay. So here's Jim Price telling  
 12 you per our conversation attached is a suggested  
 13 letter that you and Ed can edit, right?  
 14 MR. PHILLIPS: Second time you've  
 15 read that.  
 16 Q. Right. Did you -- Forgive me, I want  
 17 to get the question clear so when the witness  
 18 answers it, we can see. It states per our  
 19 conversation attached is a suggested letter that  
 20 you and Ed can edit. During your conversation with  
 21 Jim Price, did you talk to him about collaborating  
 22 with Ed in the editing of a letter that you would  
 23 now send to Jim Price who in turn would send to  
 24 Kadish?



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1 representing Kroger in this case?  
 2 A. I didn't know that.  
 3 Q. Okay. Did you instruct the lawyers  
 4 to withhold any of the Price & Marshall documents?  
 5 A. Absolutely not.  
 6 Q. Did you authorize these lawyers to  
 7 actually physically stamp and produce the Price &  
 8 Marshall documents?  
 9 A. Did not.  
 10 Q. Do you know that I served a subpoena  
 11 on Price & Marshall?  
 12 A. Did not.  
 13 Q. Now, subsequent to September 13th,  
 14 did you ever again participate in the drafting of  
 15 any letter concerning purchase of the Malease  
 16 interest, which contained any false or misleading  
 17 information in it?  
 18 A. No.  
 19 Q. You're sure?  
 20 A. Yes.  
 21 Q. Sir, isn't it a fact that on February  
 22 18th, 2002 you wrote another misleading letter to  
 23 Price?  
 24 MR. PHILLIPS: Objection,

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1 argumentative.  
 2 A. I don't write misleading letters.  
 3 Q. You know the thing about I wanted to  
 4 advise you that on July 24, 2001 Kroger Co.  
 5 purchased, you know that's in your September 13th  
 6 letter; do you see that?  
 7 A. I do.  
 8 Q. You've repeated it in the later  
 9 letter, didn't you?  
 10 A. I don't remember.  
 11 Q. Why did you write it again?  
 12 MR. PHILLIPS: Objection. He just  
 13 testified he doesn't remember. You have the  
 14 letter, why don't you show it to him.  
 15 MR. CINQUE: I sure do.  
 16 MR. PHILLIPS: Great. Let's see  
 17 it.  
 18 BY MR. CINQUE:  
 19 Q. You see at the bottom of that one it  
 20 says --  
 21 MR. PHILLIPS: Which one?  
 22 Q. I'm talking now about the September  
 23 13th letter. It says that April 2003 is only 18  
 24 months away. That seems about right, so you would

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1 agree with me in February of 2002, April of 2003  
 2 wouldn't be only 18 months away, right?  
 3 A. That is correct.  
 4 Q. Are you aware that Price & Marshall  
 5 and not Kroger and your lawyers produced a letter  
 6 dated February 18th, 2002 on Kroger letterhead?  
 7 A. I am not.  
 8 (Deposition Exhibit W was marked for  
 9 identification.)  
 10 BY MR. CINQUE:  
 11 Q. Let me show you this. We've marked  
 12 that as W. Please explain, if you can, the genesis  
 13 of Exhibit W.  
 14 A. It's a repeat of the September 13th  
 15 letter.  
 16 Q. What's the date of Exhibit W?  
 17 A. February 18th, '02.  
 18 Q. Did you cause that to be prepared on  
 19 February 18th, 2002?  
 20 A. Don't recall.  
 21 Q. Look at the fax heading up at the  
 22 top?  
 23 A. Doesn't show on this one.  
 24 Q. Sorry. I apologize, it's cut off.

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1 Take a look at my copy I'll give you. I think the  
 2 Xerox cut it off. I'll tell you what it says for  
 3 the record. The fax header, which my photocopy is  
 4 cut off somewhat, is March 20th, 2002, 10:52 a.m.  
 5 FR Kroger to (919) 788-7093, and this shows that  
 6 it's page 4 in the right-hand corner.  
 7 And it bears PM, which is Price &  
 8 Marshall bates stamp number 01538. And the way I  
 9 obtained this is it was produced to me by the  
 10 Frost, Brown firm, even though I subpoenaed it from  
 11 Price & Marshall. Do you recognize the fax header?  
 12 A. It looks like it came from Kroger on  
 13 March the 20th of '02.  
 14 Q. Can you enlighten me in any way as to  
 15 where the remaining pages of this fax transmission  
 16 might be?  
 17 A. I cannot.  
 18 Q. Did you authorize anyone to send this  
 19 to Price on March 20th, 2002?  
 20 MR. PHILLIPS: Objection.  
 21 A. I don't remember.  
 22 Q. Can you tell me anything more about  
 23 this letter, sir, than you already have?  
 24 A. Only speculate.



1 **Q. Please speculate?**  
 2 MR. PHILLIPS: I'll object.  
 3 MR. CINQUE: Your objection is  
 4 noted.  
 5 BY MR. CINQUE:  
 6 A. Someone asked us for another copy of  
 7 the letter.  
 8 **Q. So you went and changed the date?**  
 9 A. No. The system automatically updates  
 10 the date. Have you ever used software where you  
 11 plug in a date and it automatically puts the  
 12 current date on when you make another copy?  
 13 **Q. Great. Then it should have been**  
 14 **March 20th, should it, the date that you sent it?**  
 15 **February 18th, does that date stick out in your**  
 16 **mind at all?**  
 17 A. Four days after Valentine's Day.  
 18 **Q. Isn't it also the date that Kroger**  
 19 **sent a certified letter to Malease Bulkhouse ML**  
 20 **Properties? Let's look at it.**  
 21 **(Deposition Exhibit X was marked for**  
 22 **identification.)**  
 23 BY MR. CINQUE:  
 24 **Q. You recognize the February 18th, 2002**

1 MR. PHILLIPS: Thank you. Off the  
 2 record.  
 3 (Brief recess.)  
 4 MR. CINQUE: I'm genuinely finished  
 5 with Mr. Hodge.  
 6 THE WITNESS: Very good.  
 7 MR. PHILLIPS: I want to give you  
 8 another opportunity to ask questions to Ed about  
 9 document production. I think in the midst of all  
 10 that --  
 11 MR. CINQUE: After you woodshedded  
 12 him, as we say.  
 13 MR. PHILLIPS: No. Have we  
 14 discussed anything about this?  
 15 MR. WALDVOGEL: (Nodding head.)  
 16 MR. CINQUE: He doesn't look like  
 17 it. You want to have him say something?  
 18 MR. PHILLIPS: You can ask him  
 19 anything you want to.  
 20 MR. CINQUE: I don't really have any  
 21 questions.  
 22 MR. PHILLIPS: Okay, good. We'll  
 23 reserve on him, too.  
 24

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1 letter, Exhibit X, correct?  
 2 A. Yes.  
 3 **Q. That's the old letter where you're**  
 4 **notifying Malease and others with the reference to**  
 5 **Article 35, right?**  
 6 A. Yes.  
 7 **Q. This is where Kroger is saying in**  
 8 **substance pursuant to Article 35 of each of the**  
 9 **occupancy leases dated April 1st, 1983 and certain**  
 10 **provisions of the two-party agreements, right,**  
 11 **Kroger exercises its purchase option, right?**  
 12 A. Correct.  
 13 **Q. Is there any relationship of any kind**  
 14 **that you wish to share with us about Exhibit W, the**  
 15 **February 18th, 2002 letter to Jim Price and Exhibit**  
 16 **X, the February 18th, 2002 option exercise?**  
 17 A. No.  
 18 **Q. No connection whatsoever?**  
 19 A. I cannot recall any connection.  
 20 MR. PHILLIPS: Bob, do you mind if I  
 21 see the fax?  
 22 MR. CINQUE: You can take it and  
 23 copy it. You'll see it cut off. I'll give you  
 24 that. My machine does that from time to time.

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1  
 2  
 3  
 4  
 5 JAMES E. HODGE  
 6 - - -  
 7 DEPOSITION CONCLUDED AT 1:25 P.M.  
 8 - - -  
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